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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

NO. 717

E. M. PATTON, PLAINTIFF IN ERROR.

vs.

THE TEXAS & PACIFIC RAILWAY CO., DEFENDANT IN ERROR.

———o———

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE FIFTH CIRCUIT.

BRIEF FOR E. M. PATTON, PLAINTIFF IN ERROR.

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BRIEF FOR E. M. PATTON, PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

E. M. Patton, plaintiff in error, filed in the district court of El Paso county, Texas, on the 17th day of March, 1893, his petition claiming damages against the Texas & Pacific Railway Company, in the sum of twenty thousand dollars for personal injuries, alleging that on the first day of December, 1892, he was in the employ of defendant as fireman on one of its locomotive engines, and that on said date, while he was in the discharge of his duties as such, and while said engine was stopping gradually near the sand house, in El Paso, Texas, to have the fire cleaned out; and while it was moving very slowly, plaintiff attempted to step off said engine so as to get out of the way of the fire cleaner, who was about to enter upon said engine

to clean out the fire; that the step leading from the engine and cab thereof was in a bad, defective and improper condition, and was loose, so that when plaintiff attempted to step from said engine, said step being in such bad condition turned so that it threw plaintiff under said engine, and caused him to fall so that his right leg was thrown under said engine, and said engine ran over his right leg and it was bruised and lacerated and his right foot was mashed, and it became necessary to amputate his right leg about three inches above the ankle joint. That said amputation was performed, and that plaintiff was confined to his room about two months, and suffered great pain, etc. That defendant was negligent in not having said step in a good, proper and safe condition, and that in consequence of the negligence and carelessness of defendant in not keeping said step and not having same at said time in a good, safe and proper condition, but in having and allowing it to be at said time, in a bad, defective and loose condition, plaintiff sustained the injuries above mentioned, and that plaintiff was in no degree negligent. That at said time defendant knew, or ought to have known, and could have known by the exercise of reasonable diligence, that such step was in a bad, defective and loose condition, and plaintiff did not know and was not chargeable with notice that said step was in such bad condition. (See printed Trans. pp. 1-3.)

On the first day of April, 1893, the Texas & Pacific Railway Company filed its petition for the removal of said cause from said state court to the U. S. Circuit court for the Western District of Texas, and filed with its petition a bond as required by law, (see printed Trans. pp, 3-5), and an order was duly entered removing said cause from said state court to the U. S. circuit court on May 1, 1893, (see printed Trans p. 6) On the 6th day of October, 1893, the defendant, the Texas & Pacific Railway Company, filed in the U. S. Circuit court, its first amended original answer consisting of: First an exception; second a general denial; and third, a special answer in which it was admitted that plaintiff was a fireman upon one of the defendant's engines as stated in his petition, and that at the time stated in his petition plaintiff's duty was to act as fireman on defendant's engine No. 90, which engine was engaged in hauling passenger trains over defendant's road from El Paso to Toyah and from Toyah to El Paso. That at the time plaintiff was injured he was working about said engine out of the time of his duty, and voluntarily got upon said engine while the same was in charge of the yardsman, before the same had been repaired or placed in the round house, and negligently tried to get out of said engine while it was in motion, and thereby directly by his negligence contributed to the injuries that he received.

Fourth. That the engine was provided with a proper step and defendant had capable, suitable and competent inspectors who inspected it and suitable and competent machinists whose duty it was to repair said engine and who did repair it when necessary, and that said engine was carefully inspected, but inspection failed to discover the defect, if any there was in said step, and further that the plaintiff had full opportunity and knowledge of said machinery and apparatus and that he was chargeable with equal knowledge of such defect, if any, with the defendant, and that if plaintiff received the injuries alleged by him, and such injuries were caused by any negligence on the part of the employes of defendant, that such employes were fellow servants with plaintiff, etc. (See printed Trans. pp. 6-8)

The case was tried at the October term, 1893 of the U. S. circuit court, W. D. T. and on the 10th day of October, 1893, the plaintiff E. M. Patton, recovered a judgment against the defendant, Texas & Pacific Railway Company for the sum of nine thousand dollars. (See printed Trans. pp 8-8).

On October 12, 1893, the defendant railway company filed its motion for a new trial, presenting in the same the following grounds: First; that the court erred in refusing the special charge asked by defendant. Second; that the verdict of the jury is contrary to and not supported by the evidence. Third; that the verdict of the jury is contrary to the law as given in the charge of the court. Fourth; that the verdict is excessive. (See printed Trans. p. 9).

The motion for a new trial was overruled October 19, 1893, (see printed Trans. p. 10). The defendant railway company was allowed time in which to file its bill of exceptions, and on the 30th day of October, 1893, its bill of exceptions was filed, (see printed Trans. pp. 11-20). The only charge or instruction asked by the defendant railway company was one which is copied in full on pages 16 and 17 of printed transcript, which we will copy herein hereafter. Said special charge requested by the defendant railway company which was refused by the trial court was one to the effect that if the jury found certain facts to be true, then they should find that the plaintiff E. M. Patton was guilty of contributory negligence and not entitled to recover any damages from the defendant.

On the 30th day of October, 1893, the defendant railway company filed its assignments of error with its petition and bond for writ of error, taking said cause to the U. S. Circuit Court of Appeals for the Fifth Circuit at New Orleans, La. (See printed Trans. pp 20-23), and transcript was duly filed in said U. S Circuit Court of Appeals, (see printed Trans. pp. 24-26).

In its assignments of error before said Circuit Court of Appeals the said

railway company, defendant, urged only the following points: First: That the trial court erred in refusing to give the jury said special instruction which was as follows, to-wit: "If plaintiff was a fireman upon one of defendant's engines engaged in pulling passenger trains over the track into El Paso where the defendant had repair shops, and competent persons to repair its engines, and plaintiff knew this, and on the day that he was injured, the engine on which he was employed as fireman arrived in El Paso, in apparently good condition, and plaintiff left said engine and it was taken in charge by servants of the defendant, whose duty it was to inspect and repair it, and he would have ample opportunity afforded him after the same was inspected and repaired to perform his duties upon said engine in cleaning the same, and having the appliances and implements pertaining to said engine in his immediate charge, in proper condition for his outgoing trip on said engine, it was his duty to give the servants of the defendant opportunity to inspect and repair the engine and appliances before going on said engine while it was in motion, and if he did not do this, but went on the engine knowing the same had not yet been inspected and repaired, for the purpose of performing his duties in cleaning and putting in proper condition the lubricators, oil cans, and other apparatus which it was his duty to clean and prepare, and in doing so attempted to alight from said engine while it was in motion, when such alighting was not necessary in the performance of such duties, and the step of the engine was in such defective condition that it was unsafe for use in getting off of the engine while in motion and in so alighting he was injured by reason of the unsafe step, he would be guilty of contribury negligence and not entitled to recover any damages from defendant, even if, in alighting, he did so in such a manner as a prudent man would exercise if the step were unsafe,' because the proof showed that the plaintiff unnecessarily went on the engine and alighted therefrom while it was in motion at a time when he knew it had not been inspected and repaired, and thus caused the injuries he received by his own negligence, therefore defendant would not be liable therefore." Secondly: that the trial court erred in not granting defendant's motion for a new trial, etc." (See printed Trans. pp. 20-21).

On April 10, 1894, said cause came on to be heard on the transcript of the record, and the U. S. Circuit Court of Appeals for the Fifth Circuit of New Orleans, entered its judgment reversing and remanding the cause to the said Circuit Court for further proceedings, and on the 23rd day of April, 1894, E. M. Patton, plaintiff, filed his petition for rehearing, (see printed Trans. pp. 27-35), which was overruled on May 29, 1894, (see printed Trans. p. 35).

In its opinion, filed April 10, 1894, in said cause, the United States Circuit Court of Appeals for the 5th Circuit, intimates: That it was not error for the trial court to refuse to instruct the jury that under the circumstances the facts enumerated would constitute contributory negligence, and it was not error for the trial court to instruct the jury that the plaintiff could not recover upon that ground, and, although there was no special charge requested by the defendant railway company in the trial court raising the question of the sufficiency of the evidence to support a verdict in favor of the plaintiff, and no assignment of error presented to the United States Circuit Court of Appeals raising that question, the United States Circuit Court of Appeals determined: that it had authority to consider the matter of the sufficiency of the evidence to support the verdict in favor of the plaintiff Patton, and proceeded to determine that there was not sufficient evidence to sustain the judgment of the trial court. (See printed Trans. pp. 40-52)

His Honor, Judge Toulman, filed a dissenting opinion stating that he was unable to concur in the judgment of the court, and stating as his grounds for dissent that the Circuit Court of Appeals could not, of course, consider the second assignment of error urged by the railway company, which was to the effect that the trial court had erred in not granting its motion for a new trial, and that the only assignment of error presented for consideration, and the only error urged or discussed by counsel for plaintiff in error, was the refusal of the trial court to give the special charge to the effect that if the jury believed certain facts they should find that the plaintiff Patton was guilty of contributory negligence, and not entitled to recover any damages, and that by repeated decisions of the United States Supreme Court, the question of contributory negligence in such cases was not one of law to be determined by the court, but one of fact, and in the general charge of the court the jury were fully and properly instructed with respect to the question of contributory negligence. And in his dissenting opinion Judge Toulmin maintains the proposition that if the defendant, the railway company, wished to test by writ of error in the Circuit Court of Appeals the sufficiency of the evidence to sustain a verdict for the plaintiff, it should have requested the trial court at the close of the evidence to peremptorily instruct the jury to return a verdict for it. It did not do this, and the sufficency of the evidence could not be considered by the Circuit Court of Appeals; and he says that the Circuit Court of Appeals falls into an error when, in its opinion, it speaks of the exception to the charge of the court. The record shows no exception to the charge of the court, but the exception was to the omission of the court to charge

that the plaintiff was guilty of contributory negligence. And it is true as he suggests that, "The only exception shown by the record on which error is assigned, is the refusal of the court to give a special charge requested by the defendant to the effect that the plaintiff was guilty of contributory negligence and therefore could not recover. There was no error in such refusal." (See dissenting opinion, printed Trans. pp. 52-55).

E. M. Patton, plaintiff in error in this court, and defendant in error in the U. S. Circuit Court of Appeals for the Fifth Circuit, presented his petition for writ of error on the 25th day of June, 1894, which was duly allowed with supersedeas, and bond fixed at the sum of one thousand dollars on the 25th day of June, 1894, by his Honor, E. D. White, Aasociate Justice of the Supreme Court of the United States, (see printed Trans. p. 36), and on the same day he filed his assignments of error, (see printed Trans. pp 37-39) and on June 26, 1894, his writ of error bond, (see printed Trans. pp. 39-40). The writ of error was issued July 6, 1894, and citation in error issued on the same day, (see printed Trans. pp. 56-57) from this honorable court to the U. S. Circuit Court of Appeals for the Fifth Circuit, and citation in error was duly admitted and accepted on the 21st day of July, 1894, (see printed Trans. p. 57). And to reverse the judgment of the honorable Circuit Court of Appeals for the Fifth Circuit, and to have the judgment of the trial court affirmed, E. M. Patton, plaintiff in error, now prosecutes his writ of error, and urges the following as his assignments of error.

First Assignment of Error.

Said United States circuit court of appeals for the Fifth Circuit having determined that the first and only assignment of error relied upon by the Texas & Pacific Railway Company, (which brought the case by writ of error ~~from~~ to the U. S. circuit court for the fifth circuit, at New Orleans), should not be sustained, and that the trial court did not err in refusing the special charge asked, which is copied in said first assignment of error, and there being no assignment of error and no suggestion in the record upon the part of said Texas & Pacific Railway Company raising the question of the sufficiency of the evidence to support the verdict rendered in the trial court and the judgment of the trial court in favor of E. M. Patton, said U. S. circuit court for the fifth circuit erred in considering the question of the sufficiency of the evidence to sustain the verdict in and the judgment of the trial court, and erred in reversing and remanding the cause upon a point in no way raised or urged as required by law or by the rules of either said U. S. circuit court of

appeals or the supreme court, and the judgment of the trial court should have been affirmed.

Second Assignment of error.

The U. S. circuit court of appeals for the fifth circuit erred in determining that the assignment of error urged by the Texas & Pacific Railway Company, plaintiff in error, in said court was sufficient to bring before it the question of the sufficiency of the evidence adduced upon the trial in the circuit court to support the verdict of the jury. Said assignment of error is based wholly upon the refusal of the circuit court to give a special charge in which plaintiff in error sought to have the circuit court declare, as a matter of law, that certain facts should be considered as establishing contributory negligence on the part of the plaintiff below, and said special charge shows upon its face that it was asked for the reason that in the judgment of the counsel for the defendant below the evidence was sufficient to authorize a finding against defendant upon the issue of negligence, and as the special charge was based wholly upon the contention that there was "contributory negligence" that necessarily presupposed and was a confession that there was actionable negligence upon the part of defendant below; to which plaintiff below contributed.

Third Asssignment of Error.

That Texas & Pacific Railway Company having pleaded that the contributory negligence of E. M. Patton consisted in his having negligently tried to get off of the engine by which he was injured while it was in motion, and the evidence having established without contradiction and conclusively that it was the duty of Patton to keep the cab of the engine clean, to clean all that portion of the engine above the running board, and to keep the oil cans and lubricator filled with oil, and that there was no rule of the company that prohibited the fireman, Patton, from getting upon the engine for the purpose of filling his oil cans, etc., before it was placed in the round-house, and that there was no rule that specified a particular time when he should do this work, and that the only rule was that he was to have the engine in proper condition to go out when its turn came, and that the fireman could select any time that was most convenient for him to clean the cab, fill the oil cans, etc., and that while the engine was hot and the oil warm it was more convenient and could be done in less time than to wait until the engine was cooled off, and the evidence having shown without contradiction that the weather was getting cool and that Patton had to strain the oil, and that it was altogether more convenient for him to do the work when he was doing it than to wait and do it at another time, and that the manner in which Patton

got off the engine was a careful and prudent manner, and that he allghted in a careful and prudent manner and in the usual manner to alight from an engine whether in motion or standing still, and that if the step which was defective and loose, had been in repair, there was no danger in the manner in which Patton alighted from the engine, and as under the circumstances and facts of the case as tried the question of contributory negligence was not one of law, but one fact, to be determined by the jury, and the trial court, in its general charge having charged the jury properly respecting the question of contributory negligence, said trial court would have had no authority to give the special charge asked specifying certain acts and declaring that they would constitute contributory negligence, and the circuit court of appeals for the fifth circuit should simply have sustained the action of the trial court in refusing the special charge asked by the Texas & Pacific Railway Company and should have affirmed the judgment of the trial court.

Fourth Assignment of Error.

The U. S. circuit court of appeals for the fifth circuit erred, not only in considering the question of the sufficiency of the evidence to sustain the verdict and judgment in the trial court, but in holding that there was not sufficient evidence to suport the verdict and in holding that there was direct proof by the machinist at Toyah that the nut on the step was not moved while the engine was at Toyah on the trip mentioned in the evidence, and in holding that there was no evidence tending to prove that up to the time of the arrival of the engine in El Paso from Toyah the step was not all right.

Argument.

The U. S. Circuit Court of Appeals, in its opinion, says: That the reason given in the special charge requested in the trial court by the defendant why the plaintiff was not entitled to recover was that the plaintiff was guilty of contributory negligence, and proceeds to say: "This charge may not be technically correct, as contributory negligence is generally defined, when the definition is attempted in adjudged cases," and then suggests that the charge requested did not correctly present the law in so far as the issue of contributory negligence was concerned, and then suggests that because in the conclusion of said special charge the following language was used, "he would be guilty of contributory negligence and not entitled to recover any damages from defendant, even if in alighting he did so in such a careful manner as a prudent man would exercise if the step were safe," that therefore the Circuit Court of Appeals was authorized to consider the

question of the sufficiency of the evidence to support the verdict rendered in the trial court.

We have already called the attention of this court fully and fairly to the assignments of error urged by the railway company, defendant, in the Circuit Court of Appeals, and as will be seen from the transcript of the record, only one bill of exceptions was preserved, (see printed Trans. pp. 11-20), and in said bill of exceptions it is shown that the only special instruction requested by the defendant railway company, was that which has been copied already in this brief. And as we have said, said special instruction embodied simply certain facts which might be found to be true by the jury, and declared that if those facts were true, "the plaintiff Patton would be guilty of contributory negligence, and (therefore), not entitled to any damages from defendant' even if in alighting he did so in such a careful manner as a prudent man would exercise if the step were safe."

The point respecting the sufficiency of the evidence to support the verdict and support the judgment was not raised by the defendant railway company while the case was at bar and before the jury in the trial court, in any way whatever, and the defendant railway company did not urge it in any assignment of error. In support of its action in considering the question of the sufficiency of the evidence to support the judgment the Circuit Court of Appeals cites Sullivan vs Mining Company, 143 U S. p. 431. In that case the trial court instructed the jury to return a verdict for the plaintiff, giving as its reason why such a verdict should be returned, that "the location had not been made until after a certain patent was issued." And this Court in its opinion suggests that the verdict for the plaintiff was a proper one, but that the reason of the trial court was incorrect, but the incorrect ruling was a matter of no consequence because the judgment was one which must necessarily have been rendered. That case has nothing to do with the matter of practice, by which the defendant railway company in this case should have preserved, if it saw fit to do so, its right to have the sufficiency of the evidence to support the judgment in this case examined into. Our Circuit Court of Appeals refers also to the case of Kirby vs Estell, 75 Texas, p. 484. We presume that this Court, as well as every other court that is at all familiar with Texas practice, knows that the question of the sufficiency of the evidence to support a verdict or judgment can be raised in Texas in the Appelate Court upon a motion for a new trial overruled in the trial court. The Supreme Court of the State of Texas, at the time of the rendition of the opinion in the case of Kirby vs Estell, 75 Texas, p. 484, was

not limited as is the U. S. Circuit Court of Appeals for the fifth circuit and the U. S. Supreme Court to "questions of law arising upon the record."

The circuit court of appeals cites also the case of Steamship Company vs Merchant, 133 U. S. p. 375. It will be noticed that in that case, at the close of the evidence, counsel for the defendant requested the trial court to direct the jury to find a verdict for the defendant upon certain grounds, stating them, and the court refused to so direct the jury, to which the defendant excepted.

The very point we are discussing was considered in the case of New York Central and Hudson River Railroad Company vs Fraloff, by this court (U. S. Sup. Ct. Rep. Vol. 100, p. 24), where our supreme court says: "No error of law appearing upon the record, this court cannot reverse the judgment of the trial court, etc. But the trial court finding that the verdict was abundantly sustained by the evidence and that there was no ground to suppose that the jury had not done their duty impartially and justly, refused to disturb the verdict and overruled the motion for a new trial. Whether its action in that particular was erroneous or not, our power is restricted by the constitution to the determination of questions of law arising upon the record. Our authority does not extend to the re-examination of facts which have been tried by the jury under instructions correctly defining the legal rights of parties." In Shauer vs Alterton, 151 U. S. p 607, our supreme court says: "The jury were fully and properly instructed in respect to every aspect of the case, and we have no authority to set aside their verdict, even if it does not appear to be justified by the evidence." Substantially the same statement of the law is made in the case of the city of Lincoln vs Power, 151 U. S. p. 436

Again, in the case of Hartford Life and Annuity Co., vs. Unsell, 144 U S. p. 439, our U. S. supreme court used the following language: "The charge, (of the trial court), was in entire consonance with the settled doctrines of this court as established in the cases to which we have adverted. The only ground for serious doubt in respect to the case is whether the evidence was sufficient in any view of it to sustain the theory that the defendant had by its course of business with the assured, led him to believe, and that he in good faith believed, that the company waived, as to him, a strict performance of the conditions as to the payment of dues or premiums, and whether if the court had given a peremptory instruction to find for the defendant, the verdict and judgment would have been disturbed. But we need not consider the case in those aspects; for the defendant assumed that it would be submit-

ted to the jury, and asked instructions touching the several points on which it relied. It did not ask a peremptory instruction for a verdict in its behalf. It cannot, therefore, be a ground of reversal that the issues of fact were submitted to the jury."

In an action at law brought before a United States Circuit Court of Appeals by a writ of error for review, such court is a court for the correction of errors of the court below, solely. It is not a court for the correction of the mistakes of the jury, or for the retrial of issues of fact, which they have determined with the consent of the litigants. In order to obtain a review of any question by writ of error in the Circuit Court of Appeals, it must appear that the court below passed upon that very question, for there can be no review of that which has never been passed upon. And where the trial court has not been requested to decide and has not determined whether or not there was sufficient evidence to warrant a verdict *before it was rendered*, it could not have committed any error in the record, and the point could not be raised in the Circuit Court of Appeals. This rule has been followed, we dare say, by every circuit court of appeals in the Union, excepting the Circuit Court of Appeals for the Fifth Circuit, and that court seems to have been the first to depart from it, in the case at bar. See City of Lincoln vs. Sun Vapor Street Lighting Company, 8 C. C. A. p. 253 and 59 Fed. Rep. p. 761.

See dissenting opinion of his Honor Judge Toulmin in the case at bar. (Printed Trans. p. 52-55.)

Village of Alexandria vs. Stabler, 1 C. C. A. p. 611 and 50 Fed. Rep. p. 689.

German Insurance Company of Freeport vs. Frederick, 7 C. C. A. p. 122 and 58 Fed Rep. 144; Pac. Mut. Life Ins. Co. vs. Snowden, 7 C. C. A. p. 264 and 58 Fed, Rep 342.

Hupson & Reynolds Co vs. Wilgus, 6 C. C. A. p. 45 and 56 Fed. Rep. 587.

Even on a trial by the court where no request is made for a peremptory declaration that the evidence is insufficient to entitle plaintiff to a judgment, the question of the sufficiency of the evidence to support the judgment cannot be raised in the Appellant Court.

Mortinton vs. Fairbanks, 112 U. S. p. 670

Tabor vs. Com. Nat'l Bank, 10 C. C. A p. 429 and 62 Fed. Rep. p. 683.

Adkins vs. Sloane, 10 C. C. A. p. 69 and 61 Fed. Rep. p. 791.

If the defendant railway company had any exception to offer or any ob-

jection to make to the sufficiency of the evidence, and desired to raise the question of the authority of the trial court to submit the case to the jury, its exception or objection should have been taken and made while the jury were at the bar, "nor is this a mere formal or technical provision of the law," as is said by our Supreme Court in the case of Phelps vs. Meyer, 15 Howard, U. S. p. 160, "it was introduced and adhered to for the purposes of justice, for, if it is brought to the attention of the court that one of the parties excepts to the court's opinion, he has the opportunity of reconsidering or explaining it more fully to the jury, and if the exception is to the evidence the opposite party might be able to remove it by further testimony if apprised of it in time," and we might add here that if the point had been raised as to the sufficiency of the evidence in any proper way, and the trial court had ruled upon it in favor of the defendant railway company, Patton, the plaintiff in the trial court, would have had an opportunity to secure the advantage of a non-suit, or it may be that the trial court would have granted him the privilege of introducing further testimony fully covering and establishing any facts which, in the judgment of the trial court, may have been lacking. In this connection, we call attention also to Barton vs. Forsythe, 20 Howard, U. S. p. 532; also Shepard vs. Wilson, 6 Howard, U. S. p. 261.

In connection with our second assignment of error we have this to say. The assignment of error urged by the defendant railway company in the U. S. Circuit Court of Appeals was one based wholly upon the refusal of the trial court to give the special charge in which the defendant railway company sought to have the trial court declare as a matter of law that certain facts should be considered as establishing contributory negligence on the part of the plaintiff below. Said special charge was based upon the idea not that no case was made out by the plaintiff Patton, but that no matter how conclusive and overwhelming the evidence of the plaintiff in the trial court may have been to establish negligence on the part of the railway company, that if he, Patton, had been guilty of contributory negligence, he could not recover. As we have said, said special charge shows upon its face that it was asked for the reason that in the judgment of the counsel for defendant in the trial court the evidence was sufficient to authorize the finding against it on the issue of negligence, and as the special charge was based upon the contention that there was contributory negligence, it of course presupposed that there was actionable negligence on the part of the defendant below, to which the plaintiff in the trial court contributed. The plain meaning of the special charge requested is that if the plaintiff in the trial court had conducted himself, as

was suggested in the same he would be guilty of contributory negligence and therefore not entitled to recover any damages from the defendant, even if in alighting from the engine he did so in a careful and prudent manner. There is not in said special charge requested, the semblance of an intimation that the attorney for the defendant railway company thought for a moment that the evidence offered in the trial court was not sufficient to support a verdict in favor of the plaintiff Patton, and, the very special charge asked would not or could not in reason have been asked unless the attorney of the railway company, defendant, realized that it might be necessary to overcome the effect of it by having them find in favor of the railway company upon the issue of contributory negligence. This is the only meaning that can by any possible association of its words be gotten out of the special charge asked' and to say that it raises even in the most remote way the question of the sufficiency of the evidence to support a verdict in Patton's favor irrespective of the issue of contributory negligence, is to do violence to one's mind. It will be borne in mind that the trial court charged the jury fully and clearly respecting the question of contributory negligence, submitting it as a question of fact to the jury.

As we have said, the special charge asked being based wholly on the contention that there was contributory negligence instead of raising the question of the sufficiency of the evidence as to negligence, etc., it necessarily presupposed and was a confession that the issue of actionable negligence upon the part of the defendant in the trial court, was one to be submitted to the jury, unless, as a matter of law, the trial court should instruct the jury that the facts enumerated constituted contributory negligence.

"Contributory negligence is the want of ordinary care upon the part of a person injured by the actionable negligence of another combining and concurring with that negligence and contributing to the injury as a proximate cause thereof, without which the injury could not have occurred. There can be no contributory negligence on the part of the plaintiff, except in cases where there has been negligence upon the part of the defendant." See Amer. & Eng. Ency. of Law, Vol. 4, pp. 17-18 and cases cited;

Patterson's Railway Accident Law, p. 48, Sec. 47.

Cooley on Torts, p. 684.

Sherman and Redfield on Negligence, Sec. 25.

Beach on Contributory Negligence, Secs. 3-7.

In Washington vs. B. & O. R. R C., 17 W. Va. p. 190;

(same case, 10 Am. & Eng. R. R. cases, pp. 749-755) it is said, "proper-

ly speaking, contributory negligence, as the very word imports arises when the plaintiff, as well as the defendant, has done some act negligently, or has omitted, through negligence, to do some act, which it was their respective duty to do, and the combined negligence of the two parties has directly contributed to produce the injury." Again, in Simms vs. So. Car. R. R. 2 Southeastern Rep. p, 486, it is said that the negligence of the defendant must be shown before any question of contributory negligence can arise.

In Kentucky R. R. Co. vs. Thomas, 79 Ky., p. 160; (same case, 1 Am. & Eng. R. R. cases, p. 81,) it is said that "contributory negligence is a defense which confesses and avoids the plaintiff's case, and must be made out by showing affirmatively, not only that the plaintiff was guilty of negligence, but that such negligence co-operated with the negligence of the defendant to produce the injury."

In Ruter vs. Foy, 46 Iowa. p. 132 and Sleimetz vs. Kelly, 72 Ind. p. 442, it is said, "There can be no contributory negligence, except where the defendant has been guilty of negligence to which the plaintiff's negligence could contribute," and the same truth is asserted in Patterson's Railway Accident Law, Sec. 50. p. 49.

In connection with our third assignment of error, we desire to call the attention of our Supreme Court to the following:

The defendant railway company pleaded contributory negligence; that Patton negligently tried to get off of the engine while it was in motion, and that he was working out of the time of his duty and thereby directly, by his negligence, contributed to the injuries received, (see Par. 3, of defendant's answer, printed Trans. p. 7). The evidence established without contradiction that it was the duty of Patton to keep the cab of the engine clean, and to clean all that portion of the engine above the running board, and to keep the oil-cans and lubricators filled with oil, (see Par. 2, bill of exceptions, printed Trans. p. 11.) That there was no rule of the company that prohibited the fireman, Patton, from getting upon the engine for the purpose of filling his oil cans before it was placed in the round-house, and that there was no rule that specified a particular time when he should do his work, and that the only rule was that he was to have the engine in proper condition to go out when its turn came, and that the fireman could select any time that was most convenient for him to clean the cab, fill the oil cans, etc., and that while the engine was

hot and the oil warm, it was more convenient and could be done in less time than to wait until the engine was cooled off, (see Par. 5, bill of exceptions, printed Trans. p. 22.) The evidence showed without contradiction "that the weather was getting cold, and that Patton had to strain the oil, and that it was altogether more convenient to do the work when he was doing it, than to wait and do it at another time." (See Par. 16, bill of exceptions, printed Trans. p. 16.)

That the manner in which Patton got off the engine was a careful and prudent manner, and that he alighted in a careful and prudent manner from the same, in the usual manner in which to alight from an engine, whether in motion or standing still, and that if the step which was defective and loose had been in repair, there was no danger in the manner in which Patton alighted from the engine, (see Par. 15, bill of exceptions, p. 15, printed Trans.) The trial court, in its general charge, instructed the jury fully respecting the issue of contributory negligence, (see printed Trans. p. 18.)

The following authorities are all to the effect that questions of fact are to be submitted to the jury, and this includes not only cases where the facts are in dispute, but also where the question is as to the inference to be drawn from such facts after they have been determined, and the issue of negligence, or contributory negligence should always go to the jury, when the facts, which, if true, would constitute evidence of negligence are controverted, or when such facts are in dispute, but there may be a fair difference of opinion as to whether the inference of negligence should be drawn, or when the facts are undisputed and the inferences to be drawn therefrom are doubtful:

Dunlap vs. Railroad Co., 130 U. S. p. 652.

Railroad Co. vs. Powers, 149 U. S. p. 44.

Grand Trunk Railway Co. vs. Ives, 144 U. S. p. 408.

Wash. & G. R. R. Co. vs. Tobriener, 147 U. S. p. 571.

Railroad Co. vs. Converse, 139 U. S. p. 469.

Gardner vs. Mich. Cent. Railroad Co., 150 U. S. p. 348, and cases cited.

See also dissenting opinion in case at bar, (printed Trans. p. 52-25.)

Durnham vs. Trinity County Lumber Co., 73 Texas, p. 82.

Barnell & Eddy, receivers, vs. Glenn, 79 Texas, p. 534.

G. C. & S. F. Ry Co. vs, Anderson, 79 Texas, p. 251.
Railway Co. vs. Lee, 70 Texas, p. 501.
Railway Co. vs. Miller, 51 Texas, p. 275.
T, & P. Railway Co. vs. Murphy, 46 Texas, p. 356.
T. & P. Railway Co. vs. Chapman, 57 Texas, p. 82.

In our fourth assignment of error we have urged that the United States Circuit Court of Appeals for the Fifth Circuit erred not only in considering the question of the sufficiency of the evidence to sustain the verdict and judgment of the trial court, but erred also in holding that there was not sufficient evidence to support the verdict, and in holding that there was "direct proof by the machinist at Toyah that the nut on the step of the engine was not moved at Toyah," and in holding that there "was no evidence tending to prove that up to the time of the arrival of the engine in El Paso from Toyah the step was not moved."

Inasmuch as it is the province of this court, as well as the Circuit Court of Appeals, to pass upon "questions of law arising upon the record," we suppose that a review of the evidence will hardly be of interest here. But as the Circuit Court of Appeals has fallen into some very grave errors in its discussion of the evidence, we beg leave to mention a few facts to show how the Circuit Court of Appeals has been misled, and how, in exercising the functions of a jury, although neither of the two members of that court are qualified jurors in the Western District of Texas, that court could have been, probably, very greatly assisted by the argument of counsel. In other words, we beg leave to show how dangerous a thing it is for the Circuit Court of Appeals to assume and exercise the right of passing upon a mere question of evidence, in this case, where a bill of exceptions was prepared with a view to the determination of a single question of law raised by the refusal to give the special charge asked, and was not prepared with that regard for details which might be required or expected when the sufficiency of the evidence to support the judgement was called in question.

(We will say by way of parenthesis the Circuit Court of Appeals reasons as if it had been necessary for Patton to prove by the direct positive testimony of an eye witness just *who* of the employes of the railway company was negligent and the exact hour or minute when he was negligent and the exaet place where he was negligent, as well as the exact act of which his negligence consisted. The doctrine discussed in Shear-

man & Redfield on Negligence, Vol. 1, Secs. 58 and 59 [4th Edition] is entirely ignored.)

In its opinion the Circuit Court of Appeals says: "There is direct proof by the machinist at Toyah that the nut on the step was not moved while the engine was at Toyah on that trip." Again, "There is no evidence tending to prove that up to the time the engine reached El Paso, that the step was not alright." And again, "Yet, though using this step several times in alighting from the engine on the run from Toyah to El Paso, and alighting from the engine by it when he left the engine at the passenger depot in El Paso, he did not discover any defect in it."

We say, in the first place, that there is not a particle of evidence about Patton's ever having used this step which proved to be in a bad and dangerous condition on a single occasion after the engine left Toyah on the El Paso run. This is merely a surmise of the Circuit Court of Appeals, without any foundation whatever. We proved, as we have shown, that the step which turned was several inches lower than that on Patton's left side, and the presumption, if any, would be in as much as the engine was "standing still" on all occasions when Patton got off of it on the run from Toyah, that he did not use the lower step, or the defective step, at all.

There was no evidence whatever from the machinist at Toyah. Alex. Mitchell, who testified, was not the machinist at Toyah, but was the foreman of the shops and yards at Toyah, and he testifies that Mr. Young was the machinist at Toyah at the time the engine was taken into the round house there, and that it was Sunday and he, Mitchell, *believing that he was competent to do so*, undertook to make the repairs needed on the engine, which, as reported by the engineer were "to change water, grind in blower, put gasket in front joint or blower pipe and raise the pilot." That to raise the pilot (cow-catcher) required him, Mitchell, to jack up the engine and put the gibs under the spring end of the engine truck, and that as he found that he could not accomplish the task of raising the pilot after he had jacked up the front part of the engine, and as he had only the help of two Chinamen he did not raise the pilot. That the Chinamen placed two jack screws, one on each side of the front of the engine and elevated the front, that then the Chinamen brought another jack screw and put it down at the rear of the engine, near to the right step on the right side of the engine, that is near to the step which the evidence shows was loose at the time of the accident. That to put the latter jack screw in place to elevate the rear of the engine it was *necessary* to remove this step. That he, Mitchell, told the Chinamen to get the

jack screws and under his direction they placed two jack screws one on each side of the front of the engine, but without any instructions from him they brought and placed another jack screw on the ground near the step. That he, Mitchell, was out of the round house for five or ten minute, while the Chinamen were there. And he, Mitchell then proceeds to state, although *he was absent by his own confession five or ten minutes,* that the jack screw near the step was not placed under the engine to elevate it and *that the step was uot moved for the purpose of putting the jack screw there, and that the nut on the step was not moved while the engine was at Toyah* on that trip, (see paragraph 8, Bill of Exceptions, printed Trans, p. 13).

The step or loop which was on the tender was on the left side of Patton or the engineer, or anyone else getting out of the gangway backwards alighting in the proper way from the engine, and this loop was about six inches higher than the step which was loose, and naturally in alighting from the engine a man would place his left foot in the loop and would very seldom use the step on the right side at all in the mere act of stepping off or on the engine. And as the step projected directly toward the outside and away from the engine a man might step onto or off of the engine without ever detecting that it was loose, and the only way in which the fact that it was loose could have been ascertained was by an "*inspection*" of it or by pressure being brought to bear laterally upon it. (See paragraph 6, Bill of Exceptions, printed Trans. p. 12).

It was just as much the business of the *machinist* at Toyah to inspect the engine as it was the business of the machinist at El Paso to inspect the engine there. (See Bill of Exceptions, 3rd paragraph, printed Trans. p. 11), and paragraph 12, Bill of Exceptions, printed Trans. p. 15). And it was just as much the duty of the Company to inspect the engine at Toyah before its return as it was the duty of the Company to inspect the engine at El Paso. (See Bill of Exceptions, paragraph 12, printed Trans. p 15). There is no testimony whatever that the machinist whose business it was ro inspect the engine at Toyah after the run of 196 miles from El Paso ever inspected it at all, and there is no testimony whatever that anybody ever inspected it at Toyah. (See entire evidence in Bill of Exceptions, printed Transcript.)

It was at no time and nowhere admitted in the case, and there is nothing whatever in the bill of exceptions to indicate that the foreman, Mitchell, and the other employees of the railroad company (defendant below) at Toyah, were either competent or made any effort to discharge their duty; on the contrary it is shown positively by Mitchell's own testimony that he was

incompetent and an unfit man for the place he held. (See paragraph 8, Bill of Exceptions, printed Trans. p. 13). He himself testifies that he was trying to perform the machinist's duty because he believed he could do it, and that he gave up the work and failed to do the most important thing the engineer had directed to be done, viz: to raise the pilot (cow-catcher.) He says the engineer had reported and directed that *it was necessary* that the pilot should be raised, but that he, Mitchell, concluded on account of the fact that he had only two Chinamen to help him, that the engine was all right and he would let it go. And this same witness attempts to testify positively as to what the Chinamen did not do, and as to what was not done about the nut or the step rod while he was absent as he says "five or ten minntes." The jury having a chance to see Mitchell on the witness stand and hear his testimony may have believed that his "five or ten minutes" was a much longer period. There is no intimation in the record as we have said, that the Chinamen or any employee at Toyah who had anything to do with the engine was either competent or attentive to his duty.

The step turned because of the pressure of Patton's right foot as he let go with his left foot and threw his weight upon it in order that he might swing himself off the engine, as the engine was moving backwards. (See paragraph 10, Bill of Exceptions, printed Trans. p. 14). And it turned because the nut on the top of the casting was not taut and the rod to which the step was attached had become loose *so that it could be easily turned*. (See paragraph 12, Bill of Exceptions, printed Trans. p. 15).

Patton did not know that the step on the engine was in a loose or defective condition at the time he stepped down on the same and was injured, and he alighted from the engine in a careful and prudent manner and in the usual manner and if the step had not been loose there was no danger in the manner in which Patton alighted from the engine. (See Bill of Exceptions, printed Trans. p. 15). And the Bill of Exceptions clearly shows Patton was in the discharge of his duty and properly discharging his duty, at the time the accident happened. (See paragraph 5, Bill of Exceptions, printed Trans. p. 12)

The testimony showed that the machinist, Rossiter, and Patton properly screwed on the nut and fastened the step after repairs at El Paso before the trip to Toyah, and that the step would not have become loose in a trip from El Paso to Toyah and return. (See paragraph 7, Bill of Exceptions, printed Trans. p. 12). And all of the witnesses who testified about the matter testified that the nut used to tighten the step would not probably work loose in

making the trip from El Paso to Toyah and back by the jar and running of the engine, (See Par. 18, Bill of Exceptions, printed Trans., p. 16). The uncontradicted testimony of Patton showed that the step struck nothing in running the trip from El Paso to Toyah and return, and in the Bill of Exceptions it is stated, as proven, that the nut and threads of the step rod were in good condition and had not worked loose since the accident to plaintiff. (See Par. 18, Bill of Exceptions, printed Trans. p. 16).

Now we say that in the light of the evidence it was a natural impossibility for the step to have become loose without the application of some physical force, brought to bear upon the threads of the nut or the threads of the step rod which should have fastened and held the step rod securely. This court will take judicial knowledge of the fact that a screw or a nut turns from left to right, and if we locate the step, the step rod, the nut, the engine, the tender and Patton correctly, we must see that it would have been utterly impossible for the step to have turned toward the right and thrown Patton's leg under the driving wheel which was only a few inches to Patton's right in front of the step, unless the step had already been turned at least once, a full revolution, that is at least once all the way around from right to left. Unless the rod and the step had already been turned all the way around at least once or the nut had been turned so as to allow a revolution, any pressure of Patton's right foot upon the step as he was standing would only have made the step tighter, if possible. And in this connection we trust this court will pardon us for also suggesting that with the living witnesses upon the stand and all the facts stated with every little incident which would develop itself in the testimony, the court below and the attorney for the defendant company would be in a better position to pass upon the different phases of the evidence than would the Circuit Court of Appeals with nothing but the record before it. We say this in view of the fact that the court below was very careful to submit to the jury every question of fact called for by any of the cases, decided by the Supreme Court of the United States and in view of the fact that the attorney for the plaintiff in error has not seen fit to save any exception or to urge any proposition or any assignment of error to the effect that the verdict was not supported by or was contrary to the evidence, and has urged no point excepting the point that the plaintiff below was guilty of "contributory" negligence as a matter of law in not waiting until all proper repairs were made to the engine before doing the work which he, the plaintiff below did do.

The trial court in its charge gave the law as it is laid down in the follow-

ing cases:

Annie Hough vs. Texas & Pacific Ry Co., 100 (U. S.,) p. 213 to 226.
Northern Pacific Ry. Co vs. Herbert, 116 U. S. Rep., p. 642 to 660.
Washington & G. E. Ry. Co. vs. McDade, 135 U. S., p. 554 to 575.
I. & G. N. Ry. Co. vs. Kernan, 78 Tex., p. 297.
Texas & Pacific Ry. Co. vs. R. C. Wisenor, 66 Tex., p. 674.
Railway vs. McFlyea, 71 Tex., p. 390.
Texas, M. R. Co., vs. Whitmore, 58 Tex., p. 288.
G. H. & S. A., Ry. Co., vs. Farmer, 73 Tex., p. 88.
McKinney on Fellow Servants.Sec. 32 and a large number of cases cited.

If we understand these decisions they are to the effect that if the step which was so loose that it could be easily turned and through the looseness of which Patton was injured, became and was loose or was allowed to be loose through any negligent act or the want of any act upon the part of the highest or the humblest servant of the defendant below, then the defendant below was liable. The step was thoroughly and securely fastened, so that it could not and would not have worked loose on a trip from El Paso to Toyah and return. We showed by the evidence that the step must have become loose in the very nature of things by virtue of the application of some manual force to the same. It is simply foolish to suggest to any court that the step or rod could have been caused to undergo a complete revolution by the falling of a lump of coal or the falling of anything else upon it. And we maintain that as is held by this court, if any individual high or low, skilled or unskilled, Caucasian or Mongolian in the employ of the defendant below moved or tampered with the step in any way and negligently failed to put it back in a good condition, the negligence of that individual was the negligence of the defendant Company.

We have already called the attention of this court to the fact that the engine was not inspected by any one in the round house at Toyah, although it was the duty of the railroad company to have it inspected by the machinist there. We have shown that the machinist there did not even undertake to do his duty. We have shown that one Mitchell, whose business was entirely different "undertook" to repair the engine in some respects and quit because he did not think he had force sufficient to complete the job. We have shown affirmatively out of Mitchell's own mouth that he was incompetent and unreliable and that even after the engineer had reported that it was *necessary* to repair the pilot he, Mitchell, did not have the repairs made because he thought the engine would get along without them and it may be remarked that there

is nothing about an engine which being out of repair could cause a more serious calamity or a greater loss of life than the pilot. And we have shown that the only statement to overcome the presumption which arises in this case that the two Chinamen supposed that the back part of the engine was to be raised and commenced to take off the step and left it insecure after being told by Mitchell that the back part of the engine should not be raised, and the presumptions which arise against the defendant company from the very condition of the step under the circumstances established by the testimony is the testimony of this man Mitchell as to what was not done when he was away.

But without regard to the incidents connecting themselves with the Chinamen at Toyah, the evidence might have satisfied the jury that a machinist, or the engineer, or some other employee was negligent or that the company was negligent in not having the engine inspected at Toyah, or was guilty of negligence in a dozen other ways that might be mentioned, else the step could not have been in the condition in which it was.

The Circuit Court of Appeals was under the impression that the doctrine of Fellow Servants applies against Patton. It says: "It may not have been the duty of the fireman to inspect this step, etc., on the run from El Paso to Toyah and return, but it was the duty of his engineer, and they were fellow servants." (See printed Trans. p. 50). It seems to us that our U. S. Supreme Court has expressed itself with sufficient clearness about this matter to be understood by all of the inferior courts in the country. In Hough vs. T. & P. Ry. Co. 100, U. S. pp. 213-226 as well as in other cases it is said very plainly that the doctrine of Fellow-Servants has no application whatever in the case at bar.

We respectfully ask that the judgment of the U. S. Circuit Court of Appeals for the Fifth Circuit be reversed, and that the judgment of the trial court be affirmed.

MILLARD PATTERSON.
LEIGH CLARK,
Attorneys for E. M. Patton, Plaintiff in Error.

APPENDIX.

In response to our proposition, as presented in our first assignment of error, counsel for defendant in error say (see Brief, p. 19), "The bill of exceptions taken in the case sets forth the facts which were established by the testimony." We remark that the bill of exception purports to state only all of the facts in evidence "of defendant." (See Trans. p. 16.) And they say the facts were considered by the Circuit Court of Appeals in connection with the defendant's exception to the charge of the trial court. We remark emphatically that no exception to the charge of the trial court was ever taken or ever thought of. And furthermore, by Rule 4 of this honorable court, and by the rules of the U. S. Circuit Court of Appeals, 5th Circuit, such an exception is absolutely prohibited, and a bill of exceptions in such a case cannot serve the purpose of bringing up the whole of the evidence for review.

See Betts *vs.* Mugridge, 154 U. S. 644.

In support of their contention, that the Court of Appeals did not err in considering the sufficiency of the evidence to sustain the verdict in the trial court, counsel cite Wiborg *vs.* United States, U. S., p. 658, 659. They overlook the fact that the Wiborg Case was one of a *criminal* nature, to which the provisions of the 7th Amendment to the United States Constitution in no way apply, and after the repeated declarations of this honorable court to the effect that by the amendment to the Constitution, and by Article 1011 of the United States Revised Statutes a Federal appellate court would have *no authority whatever* in a civil cause such as the one under consideration to pass on the sufficiency of the evidence to sustain a verdict, we think the point ought to be considered as settled.

For the convenience of the court we cite the following cases which present a better argument in support of our position than any of which we are capable:

Parsons *vs.* Bedford, 3 Pet. (U. S.) 448.
Lincoln *vs.* Power, 151 U. S. 438.
Railway Company *vs.* Fraloff, 100 U. S. 31.
Mortinton *vs.* Fairbanks, 112 U. S. 670.

Respectfully submitted,
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166-707

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Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 149.

E. M. PATTON,
Plaintiff in Error,
vs.
THE TEXAS AND PACIFIC RAILWAY COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR DEFENDANT IN ERROR.

JOHN F. DILLON,
WINSLOW S. PIERCE,
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Counsel for the Railway Co.

C. G. Burgoyne, Walker and Centre Streets, N. Y.—1897.

Supreme Court of the United States.

OCTOBER TERM, 1896.

E. M. PATTON,
Plaintiff in Error,

vs.

THE TEXAS AND PACIFIC RAILWAY COMPANY.

No. 149.

Brief for Defendant in Error.

STATEMENT.

This action was instituted on March 17, 1893, in the District Court of El Paso County, Texas, by E. M. Patton, who, in his petition, describes himself as a resident of said county and State, against The Texas and Pacific Railway Company, which company plaintiff alleged (Tr., pp. 1, 2),

"is a corporation duly incorporated, doing business in El Paso County, Texas, and is now, and for several years has been, engaged in the business of a common carrier in said County, operating its line of railway therein."

Plaintiff was a fireman on one of the defendant railway company's locomotives and sustained injuries December 1, 1892, which were caused, as he claims, by the negligence of defendant in not keeping a certain step on the locomotive in a safe and proper condition (Tr., pp. 2, 3).

On May 1, 1893, the case was removed from the State Court to the Federal Court for the proper district (Tr., p. 6), on the petition of the defendant The Texas and Pacific Railway Company setting forth that it

" was and is a corporation duly organized and existing under and by virtue of the laws of the United States, to wit : ' An Act to incorporate the Texas and Pacific Railroad Company, and to aid in the construction of its road and for other purposes,' approved March 3, 1871, and acts amendatory thereof and supplemental thereto, including an act approved May 2, 1872, whereby, among other things, the name, style and title of said Texas and Pacific Railroad Company was changed to The Texas and Pacific Railway Company " (Tr., p. 3).

The defendant company was originally chartered by the Congress of the United States by an Act entitled " *An Act to incorporate* THE TEXAS AND PACIFIC RAILROAD COMPANY *and to aid in the construction of its road and for other purposes*" (16 Stats., 573). The first section of this Act of Congress enacts that certain persons by name

" and all such persons as shall or may be associated with them and their successors are HEREBY CREATED a body politic and corporate in fact and in law by the name, style and title of the Texas and Pacific Railroad Company and by that name shall have perpetual succession and shall be able to sue and be sued, plead and be impleaded, defend and be defended in all courts of law and equity within the United States and may make and use a common seal ; and the said corporation is hereby authorized and empowered to lay out, locate, construct, furnish, maintain and enjoy a continuous line of railroad and telegraph line with the appurtenances from a point at or near Marshall, County of Harrison, and State of Texas ; thence by the most

direct and eligible route to be determined by said company near the 32d parallel of north latitude to a point at or near El Paso; thence through New Mexico and Arizona to a point on the Rio Colorado at or near the southern boundary of California; thence by the most direct and eligible route to San Diego, California."

The Act makes a grant of right of way through the public lands and a grant of the public lands, declares the railway to be a military and post road and subjects it to public duties as such.

This Act was amended May 2d, 1872 (17 Stats., 59). The first section enacts "*That the name, style and title of the Texas and Pacific Railroad Company shall hereafter be* THE TEXAS AND PACIFIC RAILWAY COMPANY."

It was further amended March 3d, 1873 (17 Stats., 598), and June 22d, 1874 (18 Stats., 197).

In said petitition for removal it was also alleged:

"That this suit against this defendant is a suit arising under the laws of the United States constituting the charter of this defendant, and under which it is incorporated, that is to say, the said Act of Congress of the United States, approved March 3, 1871, entitled 'An Act to incorporate the Texas and Pacific Railroad Company and to aid in the construction of its road and for other purposes,' and acts amendatory on May 2, 1872, March 3, 1873, and June 22, 1874."

On the trial the defendant asked the Court to instruct the jury as follows:

"If plaintiff was a fireman upon one of the defendant's engines pulling passenger trains over the track into El Paso, where defendant had repair shops and competent persons to repair its engines, and plaintiff knew of this, and on the day that he was injured the engine on which he was employed as fireman arrived in El Paso apparently in good condition, and the plaintiff

left said engine, and it was taken in charge of by servants of the defendant whose duty it was to inspect and repair it, and he knew he would have ample time afforded him after the same was inspected and repaired to perform his duties on said engine in cleaning the same, and have the appliances and instruments pertaining to said engine in his immediate charge in proper condition for his outgoing trip on said engine, it was his duty to give servants of defendant opportunity to inspect and repair the engine and appliances before going on said engine while it was in motion, and if he did not do this, but went on said engine knowing that the same had not yet been inspected and repaired, for the purpose of performing his duties in cleaning and putting in proper condition the lubricators, oil cans and other apparatus which it was his duty to clean and repair, and in doing so attempted to alight from said engine while it was in motion, when such alighting was not necessary in the performance of such duties, and the step of the engine was in such defective condition that it was unsafe for use in getting off the engine while in motion, and in so alighting he was injured by reason of such unsafe step, he would be guilty of contributory negligence, and not entitled to recover any damages from defendant, even if in alighting he did so in such a careful manner as a prudent man would exercise if the step were safe" (Tr., pp. 16 and 46).

This request was refused, and, on appeal, the Circuit Court of Appeals held that it "in effect asked the Court to direct a verdict for the defendant," and that "it appears from the face of the record that there was no evidence to sustain the judgment of the Circuit Court." The judgment being thus manifestly erroneous, it was reversed.

Other facts are sufficiently set forth in the brief filed on behalf of plaintiff in error.

ARGUMENT.

I.

The Federal Courts have jurisdiction of this case.

The salient and controlling features of this case, as respects Federal jurisdiction, are that The Texas and Pacific Railway Company was by a public Act of the Congress of the United States directly created a corporation by the name of The Texas and Pacific Railway Company. This Court will judicially notice the Act of Congress thus creating the defendant company, and, therefore, it distinctly appears that the defendant company is strictly and purely a corporation of the United States; and this Court has so adjudged in the Pacific Removal cases.

The question of jurisdiction of the Federal Courts is always in the record, and if the record does not show Federal jurisdiction, this court will take notice of that fact and adjudge and determine accordingly, whether the question of jurisdiction is raised by the parties or not.

In *M. C. & L. M. Ry. Co. vs. Swan, 111 U. S., 379* it was said by Mr. Justice MATTHEWS on behalf of the Court:

"On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this Court, and then of the Court from which the record comes. This question the Court is bound to ask and answer for itself, even when not otherwise

suggested, and without respect to the relation of the parties to it."

In *Cameron vs. Hodges, 127 U. S., 322*, Mr. Justice MILLER (p. 325) said:

"This Court has uniformly acted upon the principle that, in order to protect itself from collusive agreements between parties who wish to litigate their controversies in the Federal Courts, it would, on its own motion, take the objection of the want of jurisdiction in the Circuit Court, especially as regards citizenship (Hilton vs. Dickinson, 108 U. S., 165; Morgan's Executor vs. Gay, 19 Wall., 81)."

The principle thus announced has been so often applied by this Court that we deem it unnecessary to make further citations. Accordingly, the first question to which we address our argument is in support of the proposition above stated.

This case was removed from the State to the Federal Court May 1, 1893, before the decision of this Court in *Tennessee vs. Union and Planters' Bank, 152 U. S., 455*, was rendered (March 19, 1894). In that case it was held that, under the Act of August 13, 1888 (c. 866), the Circuit Court of the United States has no jurisdiction, either original or by removal from a State Court, of a suit involving a Federal question, unless it appears by the plaintiff's statement of his own claim that it arises under the Constitution or a statute or treaty of the United States.

The cases reported under this title were bills in equity to recover taxes levied by the State of Tennessee. Two of them were brought in the Circuit Court of the United States and complainants only allegation as to jurisdiction was that the *defendant claimed* that the State revenue law was in violation of the Con-

stitution of the United States forbidding a State to pass any law impairing the obligation of a contract. The third case was brought in the State Court and was removed to the Federal Court though not even that allegation was made in the biil. **None of the parties to the causes was incorporated under laws of the United States nor did any of them possess any powers, rights or privileges under such laws.**

The rule thus announced was applied in *Oregon Short Line, &c., Co., vs. Skottowe, 162 U. S., 490* (decided April 20, 1896).

That case has not the slightest bearing on the question of jurisdiction in this case. The Oregon Short Line and Utah Northern Railway Company, defendant in the Skottowe case, was a consolidated corporation, which consolidated corporation was formed under authority given by State and Territorial legislation only. There was no act of Congress authorizing the consolidation. One of the constituent companies, to wit, The "Oregon Short Line Railway Company," was originally a Wyoming corporation, and another of the constituent companies, to wit, the Utah and Northern Railway Company, was originally a Utah Territorial corporation; but these two constituent companies had been respectively recognized as corporations by the acts of Congress, approved August 2d, 1882, and June 20th, 1878, referred by Mr. Justice SHIRAS in *Skottowe's* case (p. 493). These two acts of Congress were applicable to two only of the constituent companies forming the consolidated company which was the defendant in that case. They were the only acts that gave to the defendant company any federal character *or even federal flavor*. This consolidated company, under the

laws of the State of Oregon, had taken a lease of or was operating the Oregon Railway and Navigation Company in Oregon. Skottowe was injured by the said consolidated defendant company at The Dalles on the Columbia River, and within the State of Oregon. Under these circumstances this Court held that the Oregon Short Line and Utah Northern Railway Company, the defendant in that case, did not appear to be a federal corporation. For these reasons we repeat that we cannot see that it has the slightest bearing on the question of the federal jurisdiction over the case now at the bar.

In the case now presented to the Court the defendant corporation was not simply organized under a public Act of the Congress of the United States, it was directly *created* by such act. All its rights, powers and privileges are derived solely from the United States. Among them are the right "to sue and be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States." Under the decisions in *Osborne vs. Bank, 9 Wheaton, 738, 819-828*, and *Pacific Railroad Removal Cases, 115 U. S., 1*, the very right to sue a corporation created by the United States is held to be founded upon the laws of the United States. In the latter case Mr. Justice BRADLEY quoted the following from the opinion of Chief-Justice MARSHALL in the *Osborne* case:

"The case of the bank is, we think, a very strong case of this description. The charter of incorporation not only creates it, but gives it every faculty which it possesses. The power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on those contracts, is given and measured by its charter, and that charter

is a law of the United States. This being can acquire no right, make no contract, bring no suit which is not authorized by a law of the United States. It is not only itself the mere creature of a law, but all its actions and all its rights are dependent on the same law. Can a being thus constituted have a case which does not arise literally as well as substantially under the law? Take the case of a contract, which is put as the strongest against the bank.

"When a bank sues, the first question which presents itself, and which lies at the foundation of the cause, is has this legal entity a right to sue? Has it a right to come not into this Court particularly but into any Court? This depends on a law of the United States. The next question is has this being a right to make this particular contract? If this question be decided in the negative, the cause is determined against the plaintiff; and this question, too, depends entirely on a law of the United States. These are important questions, and they exist in every possible case.

"The question forms an original ingredient in every cause. Whether it in fact be relied on or not in the defense, it is still a part of the cause and may be relied on. The right of the plaintiff to sue cannot depend on the defense which the defendant may choose to set up. His right to sue is anterior to that defense, and must depend on the state of things when the action is brought. The questions which the case involved, then, must determine its character, whether those questions be made in the cause or not."

THE LEGAL STATUS of the Texas and Pacific Railway Company as a Federal corporation had been directly adjudged by this Court in what are called The Pacific Railroad Removal Cases.

Among those cases was *The Texas and Pacific Railway Company against McAllaster; Texas and Pacific Railway Co. against Kirk; same against Murphy.* The judgment of this Court in those cases was that The Texas and Pacific Company, having been created by and organized under the above mentioned Acts of Congress, was entitled to remove into the Circuit Courts of the United States suits brought against it in state courts on the ground that such suits are suits "arising under the laws of the United States," and that (115 U. S., 16) the Texas and Pacific Railway Company—"*is strictly and purely a United States corporation*"; and that "the powers, privileges and advantages given to the company by Congress, and the duties imposed upon it, are specified in the acts referred to" (those of March 3, 1871, and May 2, 1872).

It cannot be denied, therefore, that, in the language of the Judiciary Act, this is a suit of a civil nature arising under a law of the United States, of which the Circuit Court has original cognizance; nor that such a suit when brought in a State Court may be removed by authority of that act from the State Court to the Federal Court.

In this state of the decisions of this Court it becomes important to all corporations created by the laws of the United States to have the question determined whether a valuable right—that of removing cases from the State to the Federal courts—a right

recognized and enforced by this Court for more than seventy years—may be annulled and rendered valueless by the mere neglect or refusal of a plaintiff bringing suit against such a corporation in a State Court to set forth in terms the source of its being. This question is now presented for the determination of this Court.

The Scope of the Decision in the Skottowe Case.

A careful examination of the opinion in the case of *Oregon Short Line, &c., vs. Skottowe, 162 U. S., 490,* shows that the decision of that case was confined to the particular facts involved, and that the Court plainly made it so, apparently for the purpose of avoiding an undue extension of the rule announced in *Tennessee vs. Union and Planters' Bank, 152 U. S., 454.*

The Court speaking through Mr. Justice SHIRAS, said :

" Even if the acts of Congress of June 20, 1878, and August 2, 1882, so far conferred substantial rights and privileges upon the territorial and state corporations, consolidated as the Oregon Short Line and Utah Northern Railway Company, as to bring that company within the doctrine of the Pacific Railroad Removal cases, yet we think that *the present case* comes within the rule that the Federal question, or Federal character of the defendant company, must appear from the complaint in the action in order to justify a removal, and that such Federal question or character does not so appear."

The acts referred to by the Court are 20 U. S. Statutes, 241, c. 362, and 22 U. S. Statutes 185, c. 372, and have already been noticed *(ante,* p. 7*)*. By these

acts Congress merely recognized corporations already organized under local law. It conferred no new powers upon them.

The doctrine of *Osborne vs. Bank* and *The Pacific Railroad Removal cases*, as an examination of the opinions will show, is plainly that where the *very existence* of a corporation is due to a statute of the United States, where its rights, powers and privileges are derived from such a statute, it has a right to remove cases brought against it in State courts to the Federal courts. As we have already stated, this Court has held, in the *Removal cases*, that this defendant, The Texas and Pacific Railway Company, is "strictly and purely a United States corporation," and that "the powers, privileges and advantages given to the company by Congress and the duties imposed upon it, are specified in the acts referred to" (referring to the Act of Incorporation and amendments to it). In this respect it differs radically from the railroad corporations which were parties to the *Skottowe* case.

In view of these facts it is hardly probable that the remark of the Court in the *Skottowe* case above quoted was intended to apply to any other case than the one then before it.

In that case it was also said (pp. 496, 497):

"Evidence tending to show that a company, styled the Oregon Short Line and Utah Northern Railway Company was operating and conducting a line of railroad between Portland, Oregon, and The Dalles, Oregon, as a common carrier for hire; that the plaintiff, as a passenger for hire, was injured while in the lawful use of said railroad; that the injuries were caused by the defendant's negligence, and the nature and extent of the injuries, thus caused, would, if believed by the jury, have clearly sustained the material allegations of

the complaint. To justify a recovery in such a case it would not be necessary for the plaintiff to allege or to prove the extent and nature of the defendant's corporate powers. The defendant's liability did not arise out of its grants of rights and privileges from the several Territories or from the United States. It grew out of its negligence and misconduct in the management of a railroad in the State of Oregon, into which State it is not pretended that it entered *by reason of anything contained in any act of Congress.*"

* * * * * *

" But even if the Court was obliged, under the allegations of the plaintiff's complaint, to take judicial notice of the defendant company's charter, *no act of Congress was pointed out under which it was acting when operating the railroad in the State of Oregon.* So far as appears, the defendant company existed and was doing business in the State of Oregon solely under the authority of that State, whether express or permissive. *The two acts of Congress referred to do not disclose any intention on the part of Congress to confer powers or rights to be exercised outside of the Territories named therein.*"

It is evident, therefore, that the *Skottowe* decision rested on the special facts of the case, namely, that as the cause of action arose within the State of Oregon, " into which State it is not pretended that it [the railway company] entered by reason of anything contained in any Act of Congress," the mere fact that Congress had recognized the railway companies already existing in certain territories of the United States, in which the State of Oregon was not included, did not impress the railway company with such a Federal character as would entitle it to the right and privilege of removing the case from the State to the Federal Court as involving a question arising out of a Statute of the United

States. There is nothing in the opinion intimating that even if the plaintiff in his complaint had alleged the Federal Statutes above referred to they would have been held to be sufficient to justify a removal of the case from the State to the Federal Court on the ground that a right was involved based on a Federal Statute.

The Texas and Pacific Railway Company is the creature of the laws of the United States incorporated by a public act of Congress of which the Courts are bound to take judicial notice; an allegation of the title of the railway company is therefore a sufficient allegation of its Federal character.

If the complaint in this case had alleged that the defendant was a corporation created by an Act of Congress the case would unquestionably be removable to the Federal Court. The complaint contains no allegation to the contrary, but simply alleges that the defendant "is a corporation duly incorporated, doing business in El Paso County, Texas, and is * * * a common carrier in said county, operating its lines of railway therein." This allegation taken in connection with the fact which this Court will judicially notice, namely: that the defendant company is created by a public Act of Congress, is just as clearly removable as if that fact had been alleged in the complaint, since it is not necessary, under any system of pleading, to allege facts which will be judicially noticed. It is a matter of common and universal knowledge that the Texas and Pacific Company is a Federal corporation, and none other, and our point is that the allegations of the complaint, taken in connection with the fact that this Court will judicially notice, *first*, that the defendant

was created by an Act of Congress, and, *second*, that there is no act of the State Legislature in Texas, or in any other State, creating it a corporation, make the case one of unquestionable Federal jurisdiction.

Unless we concede that any person bringing suit against a corporation of the United States may by his personal *ex parte* act confer upon or deprive the Courts of the United States of jurisdiction over his case, as his interest or whim may dictate, the soundness of this proposition must be acknowledged.

The decisions of this Court following the case of *Tennessee vs. Union and Planters' Bank (supra)* are as follows:

Chappell vs. Waterworth, 155 U. S., 102, an action in ejectment, brought in the State Court, which was removed to the Federal Court on a petition setting up that the title to and right of possession of the land in controversy was in the United States, the property being in use by the Government as a site for a light-house. This Court held that the case was improperly removed.

Postal Telegraph Co. vs. Alabama, 155 U. S., 482, in which it was held that a suit between a State and a citizen of another State is not a suit between citizens of different States, and therefore cannot be removed to a Federal Court.

East Lake Land Co. vs. Brown, 155 U. S., 488, an action in ejectment, brought in the State Court and removed on a petition stating that defendant's right and title to the lands in dispute were founded upon the homestead laws of the United States. The removal was held to be improper on the authority of *Chappell vs. Waterworth (supra)*.

Oregon Short Line vs. Skottowe, 162 U. S., 490, already reviewed, *ante, p. 11, et seq.*

It will be noticed that all the decisions of this Court which require that the Federal question must appear in the plaintiff's statement of his case in order that the Federal Courts may have jurisdiction, were rendered in cases where some right expressly conferred by the Constitution, laws or treaties of the United States was involved; or which required the construction of such Constitution, laws or treaties; or in which, as in the *Skottowe* case, the defendant corporation was not created by a law of the United States or whose powers were not derived therefrom.

We respectfully submit that in cases of the character of the one at bar where the party defendant is purely a corporation of the United States, deriving all its powers, privileges and advantages from a law of the United States, the real question relates to the *person* of the defendant corporation, and that the rule properly applicable in such cases should be analogous to that applied in cases where the jurisdiction of the Federal Courts depends upon the adverse citizenship of the parties.

The defendant in this action was incorporated and derives all its powers and privileges from the Act of Congress approved March 3, 1871 (16 Stats., 573, c. 122), and the acts amendatory and supplementary thereto. As has been shown above, this Court has held it to be "strictly and purely a United States corporation." The statute appears in the official publication of the laws of the United States as a "public act" as distinguished from a "private act." Its purpose was of a distinctly public character—the building of a railway from Marshall, Texas, to San Diego, California.

Its provisions show that special benefits to the Government were intended to be secured by it. There can be no question but that the statute of incorporation is a public act.

That the Federal Courts take judicial notice of the public acts of Congress or "the law of the land" is a matter of every day occurrence.

"In like manner the law of nations and the general statutes and general customs and usages of merchants, as well as the public statutes and general laws and customs of their own country, as well ecclesiastical as civil, are recognized, without proof, by the courts of all civilized nations" (Greenleaf on Ev., Sec. 5).

This Court has held that a treaty with a foreign power is a law of the land under the Constitution, of which, as a public act, the Courts of the United States will take judicial notice. In the *Head Money cases, 112 U. S., 579*, Mr. Justice MILLER said:

"The Constitution of the United States places such provisions as these in the same category as other laws of Congress by its declaration that this 'constitution and the laws made in pursuance thereof, and all treaties made, or which shall be made, under authority of the United States, shall be the supreme law of the land.' A treaty, then, is the law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute."

See, also, *U. S. vs. Rauscher, 119 U. S., 407, 418.*

So, also, a proclamation of the President is held to be

a public act of which all Courts of the United States are bound to take notice.

Armstrong vs. U. S., 13 Wall., 154.

This Court evidently took notice of the statutes involved in the *Skottowe* case, for it considered their effect in the opinion rendered in that case (162 U. S., 496).

We therefore urge that, inasmuch as The Texas Pacific Railway Company is the creature of a public act of the Congress of the United States, having no powers except those conferred by that act, and inasmuch as the Federal Courts are bound to take judicial notice of public acts, the allegation of the petition or complaint in this case is a sufficient allegation of the federal character of the corporation.

This contention is not contrary to the decision in the *Skottowe* case, nor do we seek a revision of the ruling therein made. We respectfully submit that such ruling does not apply to the case now before the Court.

If the observation made by this Court in the *Skottowe* case (quoted *ante*, p. 11), which we respectfully submit was not necessary to the disposition of the case, is to be applied without modification to all corporations created by and organized under Federal law only, the right recognized in *Osborne vs. Bank* and *The Pacific Railroad Removal cases* will be nullified and rendered valueless, and such corporations may thus be deprived of a valuable right based on the very source of their existence; and this may be done by any individual plaintiff at his will, by mere neglect or refusal to allege the authority by which they are incorporated. More than that, the jurisdiction of the Federal Courts, so jealously guarded by statute law and by the de-

cisions of the Courts, will be placed at the disposal of such a plaintiff and be subject to his ill-will or caprice.

II.

On the face of the record there was no evidence to sustain the verdict and judgment of the Circuit Court, and therefore the judgment of the Circuit Court was properly reversed by the Circuit Court of Appeals.

The bill of exceptions taken in this case sets forth the facts which were established by the testimony. These were carefully reviewed and considered by the Circuit Court of Appeals in connection with the refusal of the Court to give an instruction asked for by the defendant, to which the defendant excepted, and also with the defendant's exception to the charge of the Court as actually given. Commenting upon the facts thus found and the charges given and refused, the Circuit Court of Appeals says (Rec., p. 49):

"The only error assigned and relied on to reverse the judgment is that the Court erred in refusing to give the charge requested by the defendant, as above shown. The request for that charge in effect asked the Court to direct a verdict for the defendant. **The hypothesis as to the proof made in the requested charge only embraced matter of fact about which there was no dispute, as most clearly appears by the narrative of the proof in the bill of exceptions above set out.** The reason given for this charge in the request

is that the plaintiff was guilty of contributory negligence. This may not be technically correct, as contributory negligence is generally defined where a definition is attempted in adjudged cases. In Sullivan vs. Iron Silver Mining Company, the trial Judge directed a verdict for the plaintiff, giving a reason for so doing which was held to be unsound, but the judgment was affirmed, because the direction was right, though technically erroneous as expressed " (143 U. S., 431).

After citing various cases bearing on the subject the Circuit Court of Appeals, at page 51 of the record, recapitulates the established and undisputed facts, and it concludes :

" Before the engine came to a standstill, while it was moving slowly, at a rate of not more than three or four miles an hour, the plaintiff in a careful manner alighted from it to make more room for firemen who were on it to clean out the fire. At this instant the step proved to be loose. On that account the plaintiff lost his footing, the engine backing passed over his foot, and he was painfully hurt and permanently disabled.

" If this did not result proximately partly from his unnecessarily leaving the engine while in motion, did it not result from the natural hazards of his employment? By what reasonable or practicable degree of care beyond the care that was used could the defendant have guarded against this accident? It seems to us that to state the case is sufficient to show that the defendant had not been negligent, and could not justly be held liable. The exception to the charge of the court and to the refusal of the requested charge having served to bring up in the bill of exceptions a full statement of all the evidence given on the trial, it appears from the face of the record that there was no evidence to sustain the judgment of the circuit court. It is thus manifestly erroneous and must be reversed."

It is the duty of an Appellate Court when material

error appears on a record before it prejudicial to the party against whom judgment is rendered to reverse that judgment; and it was on this broad ground that the Circuit Court of Appeals proceeded, namely: That there was no evidence whatever justifying a verdict and judgment in favor of the plaintiff. Whether there is any evidence from which a jury can justifiably render a verdict is always a question of law. The numerous judgments in this Court establishing this proposition need not be cited. (See extract from *Wiborg vs. United States*, *post*, *p.* 23).

Now we are met in the argument of the counsel for the plaintiff with a technical answer, namely, that although the defendant was not negligent still the Court rightfully refused the instruction asked that the plaintiff was guilty of contributory negligence, for, says the counsel, he was not guilty of contributory negligence. His position is that this judgment ought to be affirmed although the established facts do not show any actionable negligence on the part of the defendant company. This technical position cannot be sustained for the reason above stated, namely, that if the undisputed facts show that the defendant is not liable—said error appearing on the face of the record—the judgment must be reversed. That part of the facts in a personal injury case which bears on the question of the defendant's negligence and that other portion which bears on the question of the plaintiff's contributory negligence are not always capable of separation. They are always and necessarily interwoven. If the facts appearing in the bill of exceptions show, as the Circuit Court of Appeals held, that the defendant company was not liable it makes no difference whether the ground of such non-liability is that the

defendant was not negligent or that the plaintiff was guilty of contributory negligence. When we remember that the only effect of the reversal is to send the case back for a new trial is it possible that this Court will reverse the judgment of the Circuit Court of Appeals and affirm the judgment of the trial Court ?

III.

Defendant's exception to the refusal of the trial Court to charge the jury as requested, and its exception to the charge as given by that Court, drew the attention of the Circuit Court of Appeals to a plain error on the record, of which it took notice under its rule.

Whatever view may be taken of the action of the Circuit Court of Appeals in considering defendant's request for an instruction as a request that the Court should direct a verdict for the defendant, it is clear that proper consideration of the defendant's exceptions required the Appellate Court to examine the entire record, and that the result of the examination was the discovery of a plain error, namely, that there was no evidence in the record to sustain the judgment of the Circuit Court. Rule 11 of the Circuit Court of Appeals for the Fifth Circuit, which relates to assignment of errors, provides that " errors not assigned according to this rule will be disregarded, but the Court, at its option, may notice a plain error not assigned." And by Rule 24 of that Court, relating to briefs (Section 4) :

" The Court, at its option, may notice a plain error not assigned or specified."

The same rules have been adopted by all the Circuit Courts of Appeal, and establish in those courts the same practice prevailing in this court, whose Rule 21 is the same in this respect.

We submit that it is wholly immaterial how a plain error appearing in the record is brought to the knowledge of the Appellate Court—whether such knowledge is the result of an examination made necessary for the determination of another question, or whether it is the the result of such an examination of the record made by the Court of its own motion. The Circuit Court of Appeals having exercised its option in this case, it is immaterial how the particular plain error noticed by it was brought to its attention.

In the very recent case of *Wiborg vs. United States 163 U. S., 632, 658, 659*, Chief-Justice FULLER, in pronouncing the opinion of the Court, said:

" 7. No motion or request was made that the jury be instructed to find for defendants or either of them. Where an exception to a denial of such a motion or request is duly saved, it is open to the Court to consider whether there is any evidence to sustain the verdict, though not to pass upon its weight or sufficiency. And although this question was not properly raised, yet if a plain error was committed in a matter so absolutely vital to defendants, we feel ourselves at liberty to correct it. * * *

" But we think the case as to Petersen and Johansen stands on different ground, and that we may properly take notice of what we believe to be a plain error, although it was not duly excepted to. These men were the mates of the vessel, and they proceeded on the voyage under the Captain's orders. This would not

excuse them if there were proof of guilty knowledge or participation on their part in assisting a military expedition or enterprise when they left Philadelphia. We are of opinion that adequate proof to that effect is not shown by the record, and that as the case stood the jury should have been instructed to acquit them."

Mr. Justice HARLAN, who dissented from the opinion as to other matters, said (p. 660):

"I concur with my brethren in holding that the judgment against Petersen and Johansen should be reversed, and a new trial ordered as to them."

The action of this Court in thus exercising its discretion by taking notice of a plain error appearing in the record but not expressly excepted to, required no greater examination of the testimony than sufficed in this case to establish, in the judgment of the Circuit Court of Appeals, the fact that it is insufficient to support the verdict; but the instruction asked for and refused by the trial Court directed the attention of the Court to all the testimony in the case, and the Circuit Court of Appeals, upon making the necessary examination of the record, recognized the fact that upon the record no negligence of the defendant railway company had been proved, and held that the instruction asked for and refused by the trial Court "in effect asked the Court to direct a verdict for the defendant." It reversed the decision of the trial Court *for the reason that upon the face of the record there was no evidence to sustain the judgment.* We respectfully submit that if the action of the Circuit Court of Appeals, in reversing the decision of the trial Court upon this ground, had been in terms based upon its right to notice a plain error appearing on the record, under

its rule, no exception to such action could have been taken; and the decision, being an exercise of discretion, could not have been made a subject of review in this Court.

We again urge, and with confidence, that it is immaterial whether the Circuit Court of Appeals based its action on its right under its rule or on its construction of the request for an instruction. The fact that it preferred to stand upon its ruling that the request for the instruction was in effect a request to direct a verdict, instead of upon a finding *sua sponte* that a plain error within its rule existed in the record, cannot deprive defendant of substantial justice in this Court.

The judgment of the Circuit Court of Appeals should be affirmed.

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